Ethical Problems of an International Human Rights Practice

David Weissbrodt

University of Minnesota Law School, weiss001@umn.edu

Follow this and additional works at: http://scholarship.law.umn.edu/faculty_articles

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Ethical Problems of an International Human Rights Law Practice

David Weissbrodt*

Little attention has been devoted to ethical problems facing American lawyers engaged in commercial and corporate work in foreign countries or with foreign clients.¹ Even less attention has been paid to the professional responsibilities of lawyers engaged in an international human rights legal practice.² As an increasing number of lawyers become involved in the practice of international human rights law in the courts of the United States, in international fora, and abroad, issues will continue to arise regarding the ethical constraints on their work.³


The author wishes to express his gratitude to David Orbuch for his assistance in preparing this article and Nanci Smith for her untiring secretarial help.

1. For one of the few articles dealing with this issue, see Goebel, Professional Responsibility Issues in International Law Practice, 29 Am. J. Comp. L. 1 (1981).


3. A few U.S. lawyers work for international, nongovernmental and intergovernmental organizations such as Americas Watch, Amnesty International, the Indian Law Resource Center, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the International Commission of Jurists, the International Human Rights Law Group, the International Labor Organization, the Lawyers Committee for International Human Rights, and the United Nations Center for Human Rights. See generally Weissbrodt, The Contribution of International Nongovern-
This article focuses on a few of the ethical dilemmas facing U.S. lawyers who practice international human rights law. It identifies a few troublesome issues, suggests some relevant principles for resolving them, and encourages others to begin thinking about these and similar questions.

In assessing the problems identified below, this article examines two sources of ethical constraint on U.S. lawyers practicing international human rights law: the Model Code of Professional Responsibility (CPR or Model Code), which was adopted by the American Bar Association (ABA) in 1969, and the Model Rules of Professional Conduct (Model Rules), which were adopted in 1983. Part I establishes that these sources apply to the U.S. lawyer regardless of whether or not the lawyer is in the United States and whether or not he is acting as an attorney.

Attorneys who leave the countries where they practice law and travel to other nations to observe trials of political or human rights interest are free of the many customary inhibitions which domestic lawyers may consciously or unconsciously mental Organizations to the Protection of Human Rights, in 2 Human Rights in International Law 403 (T. Meron ed. 1984) (describing the contributions of nongovernmental organizations to the international protection of human rights); Landy, The Implementation Procedures of the International Labor Organization, 20 Santa Clara L. Rev. 633 (1980) (describing the development of human rights procedures for the I.L.O.). In addition, many U.S. lawyers provide unpaid legal services for the international nongovernmental organizations identified above and other international human rights organizations.

4. In a previous article, the author explored some of the ethical issues faced by international human rights organizations in choosing strategies to pursue their objectives. See Weissbrodt, Strategies for the Selection and Pursuit of International Human Rights Objectives, 8 Yale J. World Pub. Ord. 62 (1981).

5. Model Code of Professional Responsibility (1981) [hereinafter cited as CPR]. Most states have adopted some version of the Model Code. The Model Code is divided into three parts: canons, disciplinary rules (DRs), and ethical considerations (ECs). The canons enunciate broad principles which all lawyers are expected to follow. Id. at Preamble. The disciplinary rules mandate a minimum level of conduct for lawyers. Id. Should an attorney's conduct fall below this minimum level he may be subject to disbarment, suspension, or other sanction if so provided by state law. Ethical considerations are aspirational objectives which lawyers strive to achieve. Id. Should a lawyer fail to abide by ethical considerations, there are no sanctions.

6. Model Rules of Professional Conduct (1983) [hereinafter cited as Model Rules]. The Model Rules were proposed as a replacement for the Model Code. The drafting committee concluded that ethical considerations should no longer be merely aspirational goals. Hence, the Model Rules abandon the distinction between ethical considerations and disciplinary rules in favor of a single set of rules. Some Model Rules, however, state obligations while others state only that lawyers ought to follow certain principles. Accordingly, the new Model Rules consolidate the old CPR but do not entirely remove the distinction between obligations and ethical principles. The Rules have not yet met with broad approval among the states.

The text of this article frequently focuses on the CPR with footnote references to the Model Rules, particularly where the two documents contain similar language.

feel. Foreign observers may be freer to use their presence creatively to encourage trial participants to pursue justice and fairness. However, international trial observers engage in a number of activities that raise ethical issues. Part II of the article considers how these issues might be resolved under the CPR and the Model Rules.

A second set of ethical issues revolves around the uncertainties involved in zealously representing clients within the bounds of the law in international fora. In order to be an effective advocate under some important international human rights procedures, the attorney must obtain knowledge of information which is supposed to be confidential under those procedures. The extent to which a lawyer’s responsibility to his client permits efforts to discover and to use this information once obtained is not clear. For example, under the widely-discussed United Nations (UN) human rights procedure set forth in Economic and Social Council Resolution 1503 (ECOSOC 1503 or Resolution 1503)\(^8\) all actions undertaken by UN bodies in response to communications alleging consistent patterns of gross violations of human rights must be kept confidential.\(^9\) Nevertheless, anyone who cares to learn what has happened to a client’s communication can do so and the status of any particular communication is known to a large number of advocates and interested observers.\(^10\) Still, the law and some aspects of the procedures under ECOSOC 1503 are at least formally secret. Part III analyzes a U.S. lawyer’s responsibilities under the Model Code and Model Rules when confronted with this situation.

A third problem for international human rights lawyers is one which raises ethical issues for all litigators who think strategically about the development of law in their area of interest. International human rights law has only begun to evolve. As a result, advocates who propose to sue based on international human rights law in U.S. courts or international fora should not do so without considering the impact of their proposed activities upon the development of the law and institutions they wish to use. Even when a client wishes to appeal, an attorney may wish to consider these issues. Part IV focuses on a U.S. lawyer’s responsibilities in this situation and the guidance provided by the Model Code and the Model Rules.

---


9. Resolution 1503, supra note 8, at paras. 7(c), 8.

10. Similar problems arise in regard to other international human rights procedures. For example, under the UNESCO procedure for dealing with communications concerning the exercise of human rights by artists, educators, and others within UNESCO's mandate, complainants regularly receive responses which are stamped "confidential" even though there is no specific authority for this practice. See UNESCO Doc. 104 EX/Dec. 3.3 (1978). See generally Marks, The Complaint Procedure of the United Nations Educational, Scientific and Cultural Organization (UNESCO), in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 94 (H. Hannum ed. 1984).
I. Extraterritorial Effect of the Code of Professional Responsibility and the Model Rules of Professional Conduct

There are several broad provisions of the Code of Professional Responsibility and the Model Rules of Professional Conduct that imply that the ethical standards imposed by these codes apply to an attorney regardless of where he is and whether he is acting as an attorney. Although the CPR does not explicitly address this issue, Disciplinary Rule 1-102, which prohibits lawyers from engaging in illegal conduct, contains no geographical limitation, and does not purport to apply only when a lawyer is acting as a lawyer. DR 1-102 states:

(A) A lawyer shall not:

(3) Engage in illegal conduct involving moral turpitude.
(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
(5) Engage in conduct that is prejudicial to the administration of justice.
(6) Engage in any other conduct that adversely reflects on his fitness to practice law.11

The phrase "any other conduct that adversely reflects on his fitness to practice law" seems designed to reach conduct outside the scope of activity as a lawyer. The Comment to Rule 8.5 of the Model Rules states more explicitly that attorneys "remain subject to the governing authority of the jurisdiction in which they are licensed to practice" even when they are outside of the United States.12

The few cases which have considered the issue agree that one need not be acting as an attorney to be governed by the CPR.13 One well-known example is found in In re Nixon.14 Mr. Nixon, while President of the United States, was alleged to have obstructed improperly an FBI investigation of unlawful entry into the headquarters of the Democratic National Committee. The State of New York instituted proceedings to discipline Nixon, but he failed to answer, appear, or file any papers on his behalf. The court nevertheless disbarred Nixon, stating:

11. CPR DR 1-102. The analogous provision in the Model Rules is Rule 8.4. It states:

It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice. . . .

12. MODEL RULES Rule 8.4.
13. But cf. Segretti v. State Bar of Cal., 15 Cal. 3d 878, 888, 544 P.2d 929, 934, 126 Cal. Rptr. 793, 798 (1976) (suggesting that the fact that misconduct was not committed in the capacity as an attorney may be a mitigating factor in determining punishment).
We note that while Mr. Nixon was holding public office he was not acting in his capacity as an attorney. However, the power of the Court to discipline an attorney extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar.\(^{15}\)

Other, less notorious cases reach the same result. In one case, an attorney's license was revoked for willfully and knowingly attempting to evade payment of taxes by filing false and fraudulent tax returns.\(^{16}\) The court, finding that such conduct involved moral turpitude, stated: "We also reject any suggestion that misconduct of an attorney which is not connected with his professional activities or does not impair his ability to represent clients affords no basis for disciplinary action."\(^{17}\) In another case, the court held that if a lawyer engages in business and wishes to remain a member of the bar, he must conduct himself in that business in accordance with the standards imposed on members of the bar.\(^{18}\) A third case held that an attorney cannot evade his responsibility to the court, bar, or public by asserting that he was performing services which could lawfully be performed by a non-lawyer.\(^{19}\) Hence, the case law makes it clear that an attorney need not be acting as an attorney to trigger the applicability of the CPR.

That same case law is less explicit with respect to whether there are any geographical limitations on the applicability of the CPR. In the Nixon case, there was no mention of the fact that the alleged misconduct took place in Washington, D.C. and not New York, where Nixon was a member of the bar.\(^{20}\) The court assumed that New York had the power to disbar a member of its bar for violations of the CPR which occurred in Washington, D.C.

The approach of the New York court in Nixon is closely paralleled by that of the California Supreme Court in Segretti v. State Bar of California.\(^{21}\) Segretti also participated in the Watergate improprieties. He wrote bogus letters on the stationery of Senators Humphrey, Muskie, and McCarthy.\(^{22}\) The letters contained false statements, including charges that Senators Humphrey and Jackson were engaging in sexual misconduct, that Shirley Chisholm was mentally ill, and that McCarthy and Chisholm wanted their delegates to switch their votes to Humphrey.\(^{23}\) These letters must have been composed outside the State of Califor-
nia, but the court made no geographical references. The court simply stated that Segretti's acts involved moral turpitude as well as deceit and suspended his California license for two years.24

One case does directly address the issue. In In re Scallen, the Supreme Court of Minnesota held that the CPR regulates the conduct of a lawyer "anywhere in the world." 25 The court upheld the suspension of Scallen based on a Canadian criminal conviction for securities fraud. It concluded that if the foreign trial accorded the defendant fundamental fairness and due process, the foreign conviction should be admitted in U.S. proceedings as proof of the underlying facts.26 Scallen does not consider whether a U.S. attorney could be disciplined for criminal acts carried out, but not punished, outside the United States. Nor does it consider whether an attorney could be disciplined in the United States for acts carried out in foreign countries which violate civil as opposed to criminal laws. Nevertheless, cautious attorneys should probably assume that the CPR does apply to their conduct abroad. The remainder of this article presumes that the CPR does so apply.

When U.S. human rights lawyers are acting in a distant jurisdiction, they are unlikely to be the subject of ethics complaints brought pursuant to the CPR or Model Rules. The foreigners whom U.S. lawyers encounter may be uncertain as to which ethical principles apply, and they may be unaware of the procedures for bringing a complaint in the United States. In addition, it would be difficult politically for a government which is committing human rights abuses against its citizens to assert convincingly an ethics complaint against a lawyer who has sought to bring world attention to these abuses.

Furthermore, some scholars who have considered the ethical constraints on U.S. lawyers working abroad indicate that there may be situations where formal rules such as the CPR and the Model Rules conflict with higher notions of ethics and should be ignored.27 Roger Goebel argues that although a lawyer's decision to violate the formal rules is ultimately a personal one, issues of political opinion and public policy invariably come into play when a lawyer is confronted with such a decision.28 While public policy considerations may be relevant to an understanding of the oppressive nature of a foreign regime, the U.S. lawyer should not ignore the CPR and the Model Rules and rely solely on his sense of public opinion. The human rights lawyer, particularly one with little experience, can benefit from the guidance of the CPR and the Model Rules. While these codes do not directly address the problems of international human rights lawyers, they do provide general and sometimes specific guidelines as to what is, and what ought to be, permissible.

24. See id. at 887–92, 544 P.2d at 934–36, 126 Cal. Rptr. at 798–800.
26. Id. at 840.
27. See Goebel, supra note 1, at 43–45.
28. Id. at 45.
II. ETHICAL ISSUES FOR ATTORNEY OBSERVERS

In recent years, many U.S. lawyers have served as international trial observers. Indeed, the Individual Rights and Responsibilities Section of the ABA recently initiated a program of sending distinguished U.S. lawyers to trials abroad. The first trial placed under scrutiny by the ABA observers occurred during 1984 in Yugoslavia. Other U.S. lawyers have been sent abroad by Amnesty International, the Center for Constitutional Rights, the International Association of Democratic Lawyers, the International Commission of Jurists, the International Human Rights Law Group, the Lawyers Committee for International Human Rights, the Lutheran World Federation, the Minnesota Lawyers International Human Rights Committee, the National Conference of Black Lawyers, and the U.S. Department of State. These lawyers have attended trials in such diverse countries as Angola, Bangladesh, Canada, Chile, Ghana, Greece, Grenada, Guyana, Haiti, Iran, Morocco, Namibia, Nicaragua, Pakistan, South Africa, the Republic of Korea (South Korea), Spain, Sri Lanka, the Republic of China (Taiwan), and the United Kingdom.

Foreign attorneys have conversely attended trials on behalf of international human rights organizations in the United States. These international observers have attended criminal trials and post-conviction proceedings in California, New York, North Carolina, South Dakota, and Wisconsin.

International trial observers serve several purposes. First, they gather facts firsthand and prepare impartial, independent, and objective reports. Second, the participants in trials—particularly the judges and prosecutors—are likely to be more circumspect in the face of trial observers who can authoritatively and independently criticize the fairness of the proceedings. Third, observers give the defendant and the defendant's supporters a sense of international assistance and thus bolster their confidence. Fourth, the presence of an observer sent by an organization or government demonstrates the sending party's concern about the fairness of the proceedings to all of the participants in the trial.

Only a handful of observers have considered the ethical constraints on their work and it is doubtful that any code of legal ethics contains a single reference

31. See id. at 140-42.
32. See Weissbrodt, supra note 7, at 59.
33. For example, Michael Williams, an observer who was himself an English judge, indicated in an interview with the author in June 1978 that ethical considerations made him reluctant to discuss the case with the judge in the Egyptian trial he observed.
to the conduct of international trial observers. The U.S. attorney acting as a trial
observer who considers ethical constraints may wonder if the normal ethical
precepts followed in the U.S. are applicable to attorney observers visiting foreign
countries. Part I demonstrated that the CPR and Model Rules do apply to U.S.
lawyers abroad. The following section examines some specific questions faced
by international trial observers and suggests the answers required by the CPR and
Model Rules.

A. Interviewing the Jurors About the Case

A few observers have sought and obtained interviews with members of the jury
in criminal cases they have observed.44 Canon 7 of the Model Code of Profes-
sional Responsibility addresses issues of trial conduct, and in particular, commu-
nication with jurors. The rule pertaining to communication with jurors, DR
7-108(B), is quite specific. It states:

During the trial of a case:
(1) A lawyer connected therewith shall not communicate with or cause another to
communicate with any member of the jury.
(2) A lawyer who is not connected therewith shall not communicate with or cause
another to communicate with a juror concerning the case.35

An attorney trial observer surely falls within the broad category of lawyers who
are not connected with the observed case. Because the rule explicitly includes
the activities of lawyers not officially connected with the parties, it would clearly be
unethical for an attorney trial observer to interview the jurors during the trial of
the case. A trial observer could, however, within the constraints of the Model
Code, communicate with jurors concerning the case after it was concluded as
long as she did not attempt to harass or embarrass the jurors.36

B. Interviewing the Judge About the Case

Most trial observers seek to interview the judge of any trial they observe.37 The
provision regulating this issue is DR 7-110(B). It states:

34. See Weissbrodt, supra note 7, at 89 (based on an interview with J. Luthi in Geneva on Sept. 7,
1978 concerning his observation of the Valpreda trial in Rome).
35. CPR DR 7-108(B) (emphasis added). The analogous provision in the Model Rules states:
A lawyer shall not:
(a) Seek to influence a judge, juror, prospective or other official by means prohibited by law;
(b) communicate ex parte with such a person except as permitted by law; or
(c) engage in conduct intended to disrupt a tribunal.
MODEL RULES Rule 3.5.
36. CPR DR 7-108(D).
37. See Weissbrodt, supra note 7, at 87–89, 118.
In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
(1) In the course of official proceedings in the cause.
(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.38

The phrase “in an adversary proceeding, a lawyer” can be read narrowly to apply only to lawyers who represent a party in an adversary proceeding, or broadly to apply to any lawyer present at an adversary proceeding.

The subsections of DR 7-110(B) indicate that the narrow reading should be preferred. Subsection (1) refers to the “course of official proceedings.” Normally, only an attorney who represents a party is allowed to speak to the judge on the record. Observers generally do not participate in making the official record and, therefore, do not appear to be included within the scope of the provision. Subsections (2) and (3) allow written and oral communications with the judge upon notice “to opposing counsel or to the adverse party.” Attorneys cannot give notice to “opposing counsel” or the “adverse party” unless they represent a party to the proceeding. Because attorney observers do not represent parties to the proceeding, this subsection also indicates that they are not covered by DR 7-110(B).

A comparison of DR 7-110(B) with DR 7-108(B)(2),39 the provision on the permissibility of juror interviews, also indicates that a narrow reading of DR 7-110(B) should be preferred. The drafters of the CPR could have included a specific provision, as they did in DR 7-108(B)(2), stating that “a lawyer who is not connected” with a case must comply with DR 7-110(B). The drafters did not make DR 7-110(B) specifically applicable to lawyers not connected with a case, and they are likely to have made that omission intentionally. Since jurors are lay decision-makers, it makes sense to grant them more protection from outside influences than professional judges.

Finally, a narrow reading of DR 7-110(B) is consistent with the principle of freedom of expression, which is protected by the U.S. Constitution40 and the International Covenant on Civil and Political Rights.41 The first amendment guarantees the lawyer the right to make public comment about any case for which

38. CPR DR 7-110(B) (emphasis added). The analogous provision in the Model Rules is Rule 3.5. See supra note 35.
39. See supra text accompanying note 34.
40. See U.S. CONST. amend. I.
she is not counsel of record. By analogy, it would seem that a lawyer not connected with a case should have the fundamental right to ask a judge about a case. The free speech interests of lawyers not counsel in a particular case may explain the different language in DR 7-108(B)(2) and DR 7-110(B). The state's interest in protecting lay jurors from outside influences arguably outweighs the free speech interest of non-record attorneys. The free speech rights of non-record attorneys, however, arguably outweigh the state's interest in protecting judges from outside influences. The principle of free speech, together with a careful reading of the CPR, indicate that it is best to read DR 7-110(B) narrowly. Therefore, DR 7-110(B) most likely applies only to record counsel, and not to attorney trial observers.

The Model Rules can also be read to permit attorney trial observers to interview a judge about a case. Rule 3.5 states only that "[a] lawyer shall not . . . communicate ex parte with such a person [judge, juror, or prospective juror] except as permitted by law." This Rule may be interpreted to mean that no lawyer present at an adversary proceeding should communicate with a judge or jury. The final clause, "except as permitted by law," may, however, allow trial observers to communicate with a judge. Although there is no provision expressly permitting trial observers to communicate with a judge, there is also no provision prohibiting an international trial observer from communicating with a judge. Therefore, like DR 7-110(B), Rule 3.5 most likely only applies to record counsel and not to attorney trial observers.

Even if a broad interpretation of DR 7-110(B) and Model Rule 3.5 is adopted, conversations with judges are not completely barred. A cautious attorney trial observer could still interview a judge in several ways. First, pursuant to DR 7-110(B)(1), the observer could ask the judge for an interview during the official proceedings. Although this method would probably not be permitted in U.S. courts, it might accord with the procedures of a foreign judicial system. Second, DR 7-110(B)(2) suggests that the observer may submit written questions to the judge, allow the judge to answer in writing, and then deliver copies of the writings to both parties to the proceeding. Third, DR 7-110(B)(3) suggests that the observer may interview the judge orally, if she first notifies the record counsel.

42. See infra notes 59–76 and accompanying text.
43. But cf. In re Snyder, 734 F.2d 334 (8th Cir. 1984), rev'd on other grounds, 53 U.S.L.W. 4833 (U.S. June 24, 1985). The Eighth Circuit in In re Snyder suspended an attorney from practicing in the federal courts for six months because of a letter the attorney had written that was critical of the court's administration of a repayment system for attorneys undertaking pro bono criminal defense work. The letter was written to the district court judge's secretary. The court of appeals ruling was challenged on first amendment grounds, but the Supreme Court, avoiding the constitutional question, ruled that the attorney's conduct was not sufficiently "contemptuous" or "contumacious" to justify the suspension. 53 U.S.L.W. at 4837. For a criticism of the Eighth Circuit opinion in the case, see Rieger, Lawyers' Criticism of Judges: Is Freedom of Speech a Figure of Speech?, 2 CONST. COMMENTARY 69 (1985).
44. MODEL RULES Rule 3.5.
and the parties and allows them to be present at the interview. Fourth, DR 7-110(B)(4) and the Code of Judicial Conduct indicate that *ex parte* communications are forbidden. This principle implies that interviews which include both parties and their counsel are permitted. Of course, one strength of the present trial observer system is the confidentiality of observers' reports. This confidentiality would be destroyed if all parties were permitted to attend interviews between observers and judges. Therefore, the narrow interpretation of DR 7-110(B), namely that it applies only to attorneys who represent a party of record, is preferable.

Foreign observers attending a U.S. court trial should be aware of the problems they may face in attempting to speak with a U.S. judge. The U.S. judge must comply with section A(4) of Canon 3 of the Code of Judicial Conduct which states:

A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

The first sentence of section A(4) directs the judge to accord every person who is legally interested in a proceeding the full right to be heard. If an attorney observer qualifies as legally interested, she should be allowed to speak to the judge about the case. An observer is clearly interested in the proceeding or she would not be watching a particular trial. The issue is whether or not an observer is legally interested in the proceeding. Assuming the term “legally interested” can be equated with “standing to sue” or “standing to intervene,” a trial observer is probably not legally interested. The observer has no personal stake in the outcome of the trial. Hence, it seems unlikely that an observer would be deemed a legally interested person.

If an observer cannot be categorized as a legally interested party, is she then a “disinterested expert”? Arguably, an observer is disinterested; she intends to watch the trial from a neutral perspective. An observer is also somewhat of an expert at observing trials and judging the fairness of them. If an observer qualifies as a disinterested expert, a judge should be able to listen to her upon notice to the parties to the proceeding. Ordinarily, trial observers would not be presenting material to a judge, but only asking questions. The questions, however, may imply a trial observer's views and a judge's responses may also commit the judge to a particular position.

Conversely, it may be argued that an observer is not a disinterested expert, but

46. Id.
rather was sent to protect the rights of the defendant. Even if an observer is not pro-defendant, the disinterested expert exception seems designed to allow judges to talk to technical experts rather than other attorneys. It is possible that an observer is neither a legally interested person nor a disinterested expert.

Even if such an interpretation were accepted, section A(4) of the Judicial Code could nevertheless be read to allow a judge the discretion to speak to an observer about a case as long as the communication was not done ex parte. Hence, application of section A(4) would not bar observers from asking judges for interviews. Judges, however, would have the discretion to refuse such requests, and interviews would have to be conducted with the parties present. As with DR 7-110(B), application of section A(4) would hinder the confidentiality of a trial observer's work.

In conclusion, DR 7-110(B) and Model Rule 3.5 probably do not apply to U.S. attorney trial observers, and thus do not prohibit observers from interviewing judges. If those rules do apply, they only prohibit ex parte interviews. In either case, attorney observers are always restrained by the possibility of discipline for engaging in conduct prejudicial to the administration of justice. DR 1-102(A)(5) states that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." This broad provision might be used to discipline an attorney observer if her interview with a judge causes a mistrial, or sets off an international incident. An observer could respond that the foreign judicial system was so unfair that her conduct, in fact, furthered the administration of justice. Still, a court might feel political pressure to discipline an attorney whose conduct proved to be an embarrassment to the United States. Foreigners acting as trial observers in the United States should be aware that U.S. judges must comply with section (A)(4) of the Code of Judicial Conduct. Interviews will have to be conducted in the presence of all parties, and judges may, at their discretion, deny interviews.

C. Interviewing the Defense Attorney or Prosecutor About the Case

There is no provision in the CPR or the Model Rules to guide attorney trial observers who wish to interview defense attorneys or prosecutors about a case. The lack of a specific provision should mean that observers may interview defense attorneys or prosecutors under both the CPR and Model Rules. This result most effectively protects the free speech rights of attorneys acting in their individual capacity.

47. See Weissbrodt, supra note 7, at 60 n.165, 61.
48. CPR DR 1-102(A)(5). The analogous provision in the Model Rules is Rule 8.4(d). It states:

It is professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice.

Model Rules Rule 8.4d.
Even though there is no specific provision, an attorney observer is still constrained by the broad provisions of the CPR or the Model Rules and thus would be well-advised to ensure that the interview is not "prejudicial to the administration of justice" within the meaning of DR 1-102(A)(5). An attorney should also bear in mind the broad rule of DR 1-102(A)(4) and (A)(6):

(A) A lawyer shall not:

   (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
   
   (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

There is always some danger that an interview might set off an international incident, perhaps resulting in attorney discipline under DR 1-102(A)(4), (A)(5), or (A)(6). If the attorney observer is careful to remain impartial and does not unnecessarily draw public attention to her role, there should be no problem with interviewing the defense attorney or prosecutor.

A foreign observer attending a trial in a U.S. court may have difficulty convincing the prosecutor or defense attorney to grant an interview because of the U.S. lawyer's responsibility under the CPR and Model Rules. Canon 4 of the CPR directs lawyers to preserve the confidences and secrets of their clients. Disciplinary Rule 4-101 states:

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

   (1) Reveal a confidence or secret of his client.
   
   (2) Use a confidence or secret of his client to the disadvantage of the client.
   
   (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

   (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

Prosecutors and defense attorneys may reveal confidential material, but only if the client consents after full disclosure. U.S. attorneys may be unable or unwilling to concede such information.

49. See supra text accompanying note 48.

50. CPR DR 1-102(A)(4), (A)(6). The analogous provision in the Model Rules states:

   It is professional misconduct for a lawyer to:

   (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

MODEL RULES Rule 8.4(b).

51. For example, the prosecutor could object to the conduct of the observer and could complain not only to the sending organization, but to the embassy of the observer's country and to the press.

52. CPR DR 4-101(B), (C). The analogous provision in the Model Rules is Rule 1.6(a). It states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." MODEL RULES Rule 1.6(a).
ing to seek client consent and may, therefore, wish to avoid speaking with foreign trial observers.

Although Canon 4 might prevent the observer from getting answers, it should not prevent her from asking questions. When an observer asks a question, she may not know if the answer will contain confidential information. Even if the observer knows the answer will contain client confidences, she may still ask the question. Canon 4 does not prohibit the prosecutor and defense attorney from revealing secrets if their clients consent. Hence, there is no reason to prohibit an observer from asking questions. Under the CPR, ultimate responsibility for preserving client confidences rests upon prosecutors and defense attorneys, not trial observers.

D. Interviewing a Defendant Out of the Presence of His Attorney

Trial observers often wish to interview a defendant out of the presence of his attorney of record. The relevant provision of the CPR is DR 7-104(A). This provision states:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.53

This provision specifically applies to an attorney "during the course of his representation of a client." Since an attorney trial observer is not connected with either party to a trial, DR 7-104(A) does not apply to observers. Observers are thus free to interview defendants without the presence of their attorneys.

As always, there is some danger that the observer might violate a broad CPR provision such as DR 1-102(A)(4), (A)(5), or (A)(6).54 It might be considered prejudicial to the administration of justice to interview a defendant when his attorney is not present. As a matter of courtesy, an observer may wish to ask the defendant's attorney for permission to interview the defendant. Putting aside these considerations, however, the attorney observer is not prohibited by the CPR from interviewing a defendant alone.

53. CPR DR 7-104(A) (emphasis added). The analogous provision in the Model Rules states: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." MODEL RULES Rule 4.2.

54. See supra text accompanying notes 48, 50.
E. Commenting Publicly About the Trial

The subject of trial publicity is covered by DR 7-107. This disciplinary rule places significant restrictions on the ability of certain lawyers to comment publicly on a trial. These limitations apply to lawyers participating in or associated with the investigation, prosecution, or defense of criminal, civil, and administrative matters.

An attorney who acts as a trial observer is ideally a neutral, unbiased observer and is not formally associated with the prosecution or defense. Some trial observers argue that an observer is not a neutral force, but a supplemental advocate for the defense. It is true that observers usually attend trials when a defendant is in danger of being unjustifiably convicted. The observer, however, receives no payment from the defendant, nor does she take an active role in the defense. Hence, it is difficult to argue that the trial observer is truly associated with the prosecution or defense of the defendant and subject to the provisions of DR 7-107.

Even if DR 7-107 is applicable to attorney trial observers, its application is subject to first amendment restraints. Case law makes it clear that attorneys who are not counsel of record retain their first amendment rights. For example, in Polk v. State Bar of Texas, plaintiff, an attorney, was accused of driving while intoxicated. Trial was originally set for October 1971, and then reset for November 1971. When the attorney failed to appear on the October date, he was arrested and jailed for failing to appear at a criminal trial. He then issued a press release which explained the date changes and stated: "'I consider this one more awkward attempt by a dishonest and unethical district attorney and a perverse judge to assure me an unfair trial.'" The grievance committee of the State Bar of Texas reprimanded the attorney for the press statement, and he appealed. The district court held that a private citizen does not surrender his right to freedom of expression by becoming a licensed attorney. The court reasoned:

The critical statements made by Polk were remarks in response to the manner in which he was treated as a citizen and not as an attorney. At no time was Polk an attorney of record or in any way acting in his capacity as an attorney in the criminal proceedings against him, nor do the remarks purport to be made in his capacity as an attorney.

55. The analogous provision in the Model Rules is Rule 3.6.
56. CPR DR 7-107(A)-(F).
57. CPR DR 7-107(G), (H).
58. See Weissbrodt, supra note 7, at 60 n.165, 61.
60. Id. at 786.
61. Id. at 787.
62. Id. at 788.
A trial observer, similarly, acts in her individual capacity, rather than as an attorney, in the trial she observes. She should therefore not be prohibited from commenting publicly on that trial.

A federal district court in Illinois has also discussed the first amendment rights of attorneys. In In re Oliver, an attorney filed a petition asking for the postponement of all criminal cases pending in United States District Court for the Northern District of Illinois until the conclusion of the trial of the Chicago Seven. After filing suit, the attorney held a prearranged conference with the media and made comments both about his suit and the Chicago Seven case. The federal district court reprimanded him for the comments he made about his own suit but made clear that his comments about the Chicago Seven case were not the subject of the reprimand. The court stated:

The petition . . . in part and some of Mr. Oliver's comments to the press and television related to another case pending in this court, United States v. Dellinger. The comments in the petition and in the press and television interviews relating to the Dellinger case are not of course the subject of this citation. . . . The respondent obviously had the right and might even have a duty as a member of the bar to comment on any case he deems worthy of his self esteemed comments, so long as he is not active as counsel in the case he comments upon.

Oliver and Polk support the contention that non-record, attorney trial observers have a first amendment right to comment on foreign trials. Neither case considers any limitations which might be imposed pursuant to the CPR. Instead, the courts have broadly construed the right of an attorney to comment publicly on a case in which she is not the attorney of record.

One court has held that DR 7-107’s blanket prohibition of certain types of trial publicity by attorneys of record is unconstitutionally overbroad. In Chicago Council of Lawyers v. Bauer, the Seventh Circuit held that “[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed.” Even the “reasonable likelihood” of interference standard applied by a local court rule was unconstitutional according to the court.

---

64. See In re Oliver, 452 F.2d at 115 (7th Cir. 1971) (Duffy, J., dissenting).
65. 308 F. Supp. at 1185.
66. Id. at 1184–85.
68. 522 F.2d at 249. The court noted that even if the serious and imminent threat standard were incorporated in each part of the Disciplinary Rule, some portions of it would still be unconstitutional because of vagueness, or because they prohibited comments that could never be a "serious and imminent threat." See id. at 252–59.
69. 522 F.2d at 249 (discussing Rule 1.07 of the Local Criminal Rules of the District Court for the Northern District of Illinois).
In *Hirschkop v. Snead*, the Fourth Circuit disagreed with the strict standard imposed in *Bauer* under which DR 7-107 can be constitutionally enforced. The court held that the "reasonable likelihood" standard is implicit in the Rule. As such, the Rule's prohibitions of certain types of publicity in criminal cases tried before juries are constitutional. Even under the reasonable likelihood standard, however, DR 7-107 is unconstitutional when applied to civil or administrative cases or criminal bench trials.

The Supreme Court has not yet ruled on the constitutionality of DR 7-107. It appears plausible, however, that if the Supreme Court were to hear a case on this issue, it might decide that DR 7-107 is unconstitutionally overbroad. Such a decision would, of course, prohibit any restriction on the comments of trial observers, regardless of their relationship to the trial participants.

Model Rule 3.6 replaces the standard set out in the CPR with a new standard that has different ramifications for the attorney observer who wishes to make a public statement on a trial she has observed. It states that "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding." This standard is at once broader and narrower than DR 7-107 of the Model Code. Taking account of the constitutional considerations raised in *Bauer* and *Hirschkop*, it is sufficiently limited to permit an attorney observer to comment on the fairness of a proceeding. An attorney observer may not, however, base her right to comment publicly on the fact that she is not officially associated with the investigation, prosecution, or defense of a matter. The Model Rules do not distinguish between neutral observers and participants. Hence, an attorney observer may not claim that her comments are beyond the scope of the Model Rules because she is not counsel of record in the case she is observing.

**F. What an Observer Should Do if She Learns of Exculpatory Facts**

The only CPR provision which relates directly to disclosure of exculpatory facts is DR 7-103(B). It requires public prosecutors and government lawyers in

---

70. 594 F.2d 356 (4th Cir. 1979).
71. 594 F.2d at 362, 370.
72. Id. at 368.
73. 594 F.2d at 368–71.
74. Id. at 372–74. The court, citing *Bauer*, held DR-107(D), which prohibits "statements that are reasonably likely to interfere with a fair trial," unconstitutional because of vagueness. *Id.* at 371.
75. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding unconstitutional the prohibition of advertising by lawyers). The decision in *Bates* may have an effect on the analysis of DR 7-107 by the courts. One of the underlying purposes of DR 7-107 is to prevent attorneys from making public statements for the purpose of gaining free advertising. Now that attorney advertising is permitted, one of the underlying rationales for DR 7-107 is gone.
76. MODEL RULES Rule 3.6 (emphasis added).
criminal trials to disclose to the defendants or their counsel the existence of evidence that tends to "negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." Because trial observers do not work for the prosecution, they are under no obligation to report exculpatory facts to defense counsel.

There is only one situation where a trial observer may be required to report exculpatory facts. This situation occurs where an observer learns that a fraud has been perpetrated upon the tribunal. In this case, under DR 7-102(B)(2), an observer is required to reveal the fraud promptly to the tribunal. This problem may occur, for example, if a trial observer learns that a prosecution witness has committed perjury.

The dependence of the duty to disclose on the presence or absence of fraud makes little sense. Failure to disclose any type of exculpatory information is prejudicial to clients and the administration of justice. Even if an observer is not required to disclose exculpatory facts to the defense under DR 7-103(B), DR 1-102(A)(5), which requires lawyers to refrain from conduct prejudicial to the administration of justice, suggests that an observer ought not remain silent about those facts.

If an observer decides to disclose exculpatory facts to the defense, she must decide whether the prosecution and judge should also be apprised of those facts. The CPR and the Model Rules provide no guidance on this issue. If an observer is to remain neutral, however, she should reveal the information to all parties.

There is an obvious discrepancy in this situation between what the observer must and should do. An attorney observer is only required to reveal fraud perpetrated on a tribunal to that tribunal. If an observer reveals a fraud to the judge, however, she should also reveal the fraud to the prosecution and defense. If an observer discovers nonfraudulent exculpatory information, she does not have to reveal it. The CPR implies, however, that she should reveal the information to the defense. Because of the observer's neutral status, she should also disclose the information to the prosecution and the judge.

77. CPR DR 7-103(B). The analogous provision in the Model Rules is Rule 3.8(d). It states:

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

MODEL RULES Rule 3.8(d).

78. CPR DR 7-102(B)(2). The analogous provision in the Model Rules is Rule 3.3(a)(2).

79. See supra note 50 and accompanying text.
G. What an Observer Should Do if She Learns of Incriminating Facts

Analysis of this issue is similar to the analysis of the duty to disclose exculpatory facts. If an attorney observer learns that a defendant or a defense witness has perpetrated a fraud upon a tribunal, the tribunal must be notified pursuant to DR 7-102(B)(2). To maintain neutrality, an observer may then wish to reveal the same information to the prosecution and the defense.

If an observer learns incriminating facts but there was no fraud upon the court, the answer to this question becomes more difficult. There is no counterpart to DR 7-102(B) concerning incriminating evidence. Therefore, the CPR places no affirmative duty on an observer to reveal such evidence, nor can one infer such a duty from language in the CPR. An attorney observer must use her own judgment in deciding whether incriminating facts should be revealed. Since a trial observer is not a participant in the proceedings, she should be reluctant to get involved by providing information to the court or the parties. Such involvement may undermine the observer's appearance of neutrality. If an observer reveals such information, however, neutrality might dictate that all parties be notified of the new evidence.

H. Conclusion

Both the Model Code and the Model Rules prohibit U.S. attorney observers from interviewing jurors but probably do not prohibit them from interviewing judges. Observers can also interview defense attorneys or prosecutors about their cases and can probably interview defendants outside the presence of their attorneys. Attorney observers can comment publicly about cases that they have observed, both during and after trials. If an attorney observer discovers that someone has perpetrated a fraud upon the tribunal, the observer must tell the tribunal. In the absence of fraud, the observer need not reveal exculpatory facts, but probably should reveal them to the parties involved. In the absence of fraud, the observer should use her own discretion in deciding whether to reveal incriminating facts so long as she does not undermine her appearance of neutrality.

III. THE LIMITS OF ZEALOUS REPRESENTATION IN THE INTERNATIONAL HUMAN RIGHTS SETTING

The Model Code requires a lawyer to act with competence and proper care in representing a client. The Model Rules define competent representation as that "legal knowledge, skill, thoroughness, and preparation reasonably necessary for . . . representation" of a client. This definition, however, does not answer the

80. CPR Canon 6, EC 6-1.
81. MODEL RULES Rule 1.1.
question of whether competent representation includes acquiring and utilizing confidential information in the representation of a client. The answer to this question becomes important in both international and domestic law. One of these situations in the field of international law occurs when an attorney litigating a claim under a United Nations human rights procedure cannot pursue it adequately without acquiring information which is supposed to be kept confidential under the rules of the United Nations. A U.S. lawyer's responsibility to his client under the Model Rules and Model Code generally permit him to acquire and use this confidential information.

A. The Procedural Setting for the Problem

The problems caused by confidentiality requirements are illustrated by the difficulties that arise when a lawyer represents a client pursuant to the procedure established under the United Nations Economic and Social Council Resolution 1503. This procedure is biased against complainant-clients. It can be manipulated by the governments involved to the detriment of complainants. While the procedure can result in some benefit for a complainant, a positive outcome is more likely if a complainant's lawyer is willing to take the necessary measures to represent the client zealously, even if such actions are not envisioned under the UN procedures.

Resolution 1503 establishes one of the most important international procedures for the consideration of communications concerning human rights violations. While there are other human rights procedures in the United Nations and elsewhere which afford more careful deliberation, are more prompt, give individual complainants more rights, and may provide a better chance of remedy, the 1503 procedure has, over the past decade, remained one of the most important and certainly one of the best-known procedures. The 1503 process culminates in the announcement, by the Chair of the UN Commission on Human Rights, of a list of countries responsible for a consistent pattern of gross human rights vio-

82. Resolution 1503, supra note 8.
Inclusion in this widely-published list is embarrassing for any government.

Resolution 1503 provides that any communications received by the United Nations alleging a consistent pattern of gross violations of human rights shall be considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Sub-Commission delegates the first review of the thousands of communications received by the United Nations prior to July 1st of each year to a Working Group of five members of the Sub-Commission. The Working Group meets for two weeks in late July and considers not only the communications, but also any responses which the governments concerned may wish to provide. No provisions are made for notifying the complainant as to the government's response or for permitting a rebuttal. Generally, only about two or three dozen communications are considered sufficiently meritorious to be given serious consideration by the Working Group. Although there is authority for consolidating individual communications to assess whether a consistent pattern of gross violations of human rights exists in a particular country, the Working Group carefully reviews only those single communications which muster sufficient facts to support a finding that a government is responsible for gross and systematic human rights violations.

The 1503 procedure requires that all measures taken throughout the process be kept confidential. The Working Group must meet in secret session and report its


86. See Resolution 1503, supra note 8, at paras. 1, 5.

87. In the cases of Argentina and Uruguay, the problems of confidentiality, secret law, and secret procedure under Resolution 1503 may have been partially resolved by the action of the UN Economic and Social Council at its 1985 session. Since 1977 Uruguay has been kept under consideration by the Commission on Human Rights as exhibiting a consistent pattern of gross violations. See Tolley, supra note 84, at 442, 446 (1984). In the fall of 1984 the Sub-Commission on Prevention of Discrimination and Protection of Minorities evidently referred the human rights situation to the Commission under Resolution 1503. But in the intervening months there was an election in Uruguay and a change in government. Most of the prisoners who had been held for years have been released, the "Punta Rieles" prison has been closed, and exiles are being welcomed home. Statement of Senator Alberto Zumaran, Especial Representative of the Government of Uruguay to the United Nations Commission on Human Rights (Mar. 8, 1985).
conclusions to the Sub-Commission in a confidential document. The Sub-Commission is required to refer confidentially to the UN Commission on Human Rights those "situations" that "appear to reveal a consistent pattern of gross violations." In practice, however, the Sub-Commission follows a different procedure. During August sessions, the Sub-Commission rejects some communications and keeps others under consideration until the following year's session. The Sub-Commission's decisions are "confidential"; authors of communications are not informed whether they have won or lost. The United Nations, however, without authority under ECOSOC 1503, has developed a practice of informing the affected governments that communications regarding their country have been transmitted to the UN Commission on Human Rights or have been kept under review by the Sub-Commission.

Each January, a Working Group on Communications, comprised of members of the Commission on Human Rights, meets before the Commission session to draft recommendations as to how each 1503 communication should be handled by the Commission. The Working Group meets in private session and may recommend various dispositions to the full Commission. Under ECOSOC 1503, the Commission is authorized to meet in private during its February-March session to recommend the mounting of a "thorough study" or an even more intensive inquiry by an ad hoc fact-finding body. In fact, the Commission has never actually recommended either of the two approaches authorized under ECOSOC 1503. Instead, the Working Group has proposed and the Commission has developed an expanding repertoire of approaches to the accused government. The Working Group may, among other measures, pose written questions to the government concerned, authorize a member of the Commission to make direct

---

After several governments congratulated Uruguay on the progress it had made toward human rights, the Commission went into private session to consider the still pending complaint under ECOSOC 1503. After a brief confidential session, the Chairman of the Commission announced that the Commission had decided to discontinue the discussions of Uruguay under its confidential procedure. The Chairman added that the "documents on the subject were no longer secret." United Nations, Press Release No. HR/1680, at 1 (Mar. 8, 1985).

While the Commission's decision on Uruguay was being considered by the Economic and Social Council (ECOSOC), the government of Argentina also asked for the release of material relating to proceedings against the previous government in that country. The ECOSOC decided to make public 1503 documents on both Argentina and Uruguay. See U.N. Economic and Social Council, Report of the Second (Social) Committee, U.N. Doc. E/1985/95, at 25, 31 (1985). When the ECOSOC decisions on the Argentina and Uruguay materials have been implemented, significant insights into the secret processes of Resolution 1503 will be possible for both scholars and potential litigants. Nevertheless, other cases remain cloaked in confidentiality.

88. Resolution 1503, supra note 8, at para. 8.
89. Id. at paras. 5, 8.
90. See id. at paras. 6, 7.
contact with the government, send a UN staff person to the country, keep the case under consideration, or dismiss the case.

In 1979 the Commission decided in private session that accused governments should be permitted to participate in the private session—even while the votes are taken on each communication. Authors of communications are not, however, permitted to attend. The Working Group's recommendations are not even provided to authors of communications, and the Commission itself meets in private session to consider 1503 communications.

In the public session following the private 1503 deliberations, little information regarding the status of the proceeding is revealed. The Chair of the Commission announces only that certain governments have been the subject of discussions under ECOSOC 1503. Until the 1984 session, the Chair did not reveal how the Commission dealt with the communications or anything about the substance of the communications. In 1984 and 1985, although not authorized by ECOSOC 1503, the Chair did announce that the Commission had determined to drop the communications about certain countries identified in the list.

It should be clear from the brief description above that beginning on the date when the communication is submitted until the very fragmentary announcement of the Commission's decision, the complainant-author of the communication is not officially permitted to know how the communication has been received. In this respect, the Commission closely follows the wording of Resolution 1503 which requires that "all actions envisaged in the implementation of the present resolution . . . shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council." But while the 1503 process leaves the complainants in the dark, the accused governments are informed and involved at several important points. Indeed, the purpose of the secrecy is obviously to shield the governments from undue or, indeed, nearly any embarrassment—at least until the Chair of the Commission announces the Commission's decision.

In order to be an effective advocate in this rather strange setting, an attorney needs to know whether the government answered the communication, how the government responded, whether the Working Group referred the communication to the Sub-Commission, whether the Sub-Commission referred the matter to the Commission, what recommendation was made by the Working Group, the nature of the defense raised by the government at the Commission, and the Commission's decision.

91. The authors of the communications are never informed whether they have won or lost. The substance of the communication is not generally released. Because there may be several communications about one country relating to different matters, a complainant-author is left uncertain as to whether it would be appropriate to file a new communication for the following year.

92. See, e.g., 40th Sess. Report, supra note 84, at 151.

93. Resolution 1503, supra note 8, at para. 8. The language of paragraph 8 appears to bind UN employees and other official participants in the 1503 process, but does not apply to attorneys representing clients who are not officially informed of the "actions envisaged." Id.
sion's resolution of the issue. If an attorney knows the status of a complaint, she can effectively lobby for the complainant's position with members of the Sub-Commission. In addition, an informed attorney can press the accused government to agree to a solution that will allow the government to avoid embarrassment. Governments lobby the members of the Sub-Commission throughout the process and often without corresponding lobbying from a complainant's side, his chance of success is diminished. Furthermore, if a complainant knows that his complaint was successful in the Sub-Commission, he can provide updated information to supplement the complaint for consideration by the Commission.

Despite the rather daunting language of ECOSOC 1503 and considerable effort by responsible UN officials to keep the process secret, most authors of communications are able to obtain information regarding the status of their complaints. The Sub-Commission is comprised of 26 individuals who are nominated by their governments and elected for three-year terms by the Commission. In principle, the members of the Sub-Commission are experts on human rights who are at least formally independent of their governments. Some members of the Sub-Commission are, in fact, well-recognized experts and maintain their independence. Others work as diplomats or government employees and have very little independence from their governments or expertise in human rights. With such a diverse group, it is not surprising that the members of the Sub-Commission maintain the confidentiality of the 1503 process in varying degrees. Some members inform their own governments about the results of each step in the 1503 process—particularly if their governments have been accused of violating human rights. Once a member tells anyone about the results of the Sub-Commission's deliberations, word travels fast. Observers for governments, intergovernmental organizations, and nongovernmental organizations also attend the public meetings of the Sub-Commission. These observers are often willing to discuss the status of communications before the Commission. As a result, most attorneys for complainants can discover the status of 1503 complaints without effort. Indeed, the tentative list of countries developed by the Sub-Commission is often published in the Guardian or other newspapers.

Once discussion of a communication moves to the full Commission on Human Rights, it becomes even easier for an attorney to obtain information regarding its

94. The staff of the communications unit in the UN Center for Human Rights is extremely reticent in speaking to with either government or nongovernmental representatives. They are careful not to reveal confidential material. Governments are much less reluctant to discuss these issues—particularly if leakage of information might be consistent with their political interest.


status. The Commission on Human Rights is comprised of 43 governments. With so many governmental delegations, it is likely that the relevant aspects of a particular 1503 proceeding will become known to anyone who attends Commission sessions and wishes to know the status of a communication.

Some governments have objected to the continual leaks of confidential information, but, because governments are the principal source of the leaks, the Commission on Human Rights has not been able effectively to eliminate them. On at least three occasions the Commission has adopted resolutions expressing concern over leaks of confidential information. On two of these occasions the Commission went so far as to initiate investigations to discover the source of information published in *Le Monde* and the *Guardian*.\(^7\) The investigations were promptly dropped when the two reporters refused to identify their sources. There was no sanction imposed upon the reporters. The third leak was made by the chief U.S. delegate to the UN Commission on Human Rights in 1980 when he announced in a press conference that he was pleased that the German Democratic Republic was being considered under the 1503 process.\(^8\)

While it is clear that Resolution 1503 forbids the release of information concerning the progress of a communication alleging a consistent pattern of gross violations of human rights, it is also clear that the prohibition is not effectively enforced and that lawyers who represent complainants need to and regularly do obtain the information necessary to pursue their claims through the labyrinth of UN bodies. On the one hand, the norm of confidentiality does persist and is prominently mentioned by government representatives at the Commission on Human Rights. On the other hand, it is doubtful that such a loosely and unfairly enforced norm of confidentiality ought to be the basis of any ethical complaint against a U.S. lawyer who breaches this norm. A lawyer cannot properly represent a client without in some way breaching the norm. Accordingly, U.S. lawyers must come to grips with the proper approach to the confidentiality requirement of ECOSOC 1503.

**B. The Restraints on Obtaining Confidential Information Imposed by the Code and the Model Rules**

U.S. attorneys are bound by Canon 7 of the Code of Professional Responsibility to represent their clients "zealously within the bounds of the law."\(^9\) The

---

\(^7\) Report of the Sub-Comm'n on the Prevention of Discrim. & Protection of Minorities on its 31st Session, Res. 10, U.N. Doc. E/CN.4/1296, at 70 (1978), discussed in T. ZUJOYUK, supra note 8, at 44. The decision to undertake the investigation of the *Guardian* was not officially reported.


\(^9\) CPR Canon 7.
Model Rules use different words but impose a similar burden. To carry out this duty, an attorney must leave no stones unturned in fulfilling his duty of representation to a client. An attorney may not, however, break the law in representing a client.

When working in an international setting, and in particular in an ECOSOC 1503 proceeding, it is difficult for attorneys to know when zealous representation has gone beyond the bounds of the law. The written rules and procedures often differ from actual practice. In order to represent their client, attorneys needs to know more than they would be permitted to know under a restrictive reading of the UN rules.

Although it is not public information, attorneys need to know the status of 1503 proceedings. Knowledge of the relevant facts is imperative to effective representation. Therefore, attorneys must attempt to obtain all information relevant to their clients' 1503 complaints. Neither the CPR nor the Model Rules prohibit attorneys from learning relevant information.

An attorney may use any means that are not illegal in order to obtain this information. The CPR limits an attorney's activities by prohibiting him from assisting his client "in conduct that the lawyer knows to be illegal or fraudulent" and in knowingly engaging in illegal conduct himself. The Code does not define illegal conduct. Instead, it leaves this question to local law. Hence, some means, such as breaking into an office to obtain information, clearly would be illegal, while others, such as asking an acquaintance what happened in a meeting, would not be illegal. When determining whether a certain means of gaining information might be illegal, it can be argued that an attorney should resolve all doubt in favor of his client.

---

100. MODEL RULES Rules 1.1-1.3.
101. CPR 7-102(A)(7). See also MODEL RULES Rule 1.2(d).
102. Id. at 7-102(A)(8). There is no equivalent provision in the Model Rules.
103. Cf. CPR EC 7-3. It seems a violation of fundamental fairness that the 1503 procedure affords governments so much access to the decision makers and complainants so little. Indeed, there is so much secret law and secret procedure in the 1503 process, that it would be inappropriate to suggest that an attorney is somehow unethical in trying to cope effectively with a basically unfair system.

Professor Frank Newman was one of the first advocates to grapple with the secrecy, news leaks, and rumors surrounding the 1503 procedures. He observed that "[e]ven if the UN procedures are Caligula-like, for due justice we ought not yet rely on inadvertence or gumshoe techniques." Newman, The new United Nations procedures for human rights complaints: reform, status quo, or chambers of horror?, 34 ANNALES DE DROIT 129, 133 (1974).

Such problems of secret law have occurred in the United States. See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388, 412–13 (1935); Griswold, Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation, 48 HARV. L. REV. 198, 198, 212–13 (1934) (arguing for the passage of a statute that would require the publication of all administration rules and regulations); Newman, Government and Ignorance—A Progress Report on Publication of Federal Regulations, 63 HARV. L. REV. 929, 929–31 (1950); see also I K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.18, at 364–65 (2nd ed. 1978). In Lapeyre v. United States, 84 U.S. (17 Wall.) 191 (1872), the Supreme Court sustained the application of a Presidential proclamation which had been filed with the Secretary
Once information regarding the status of a proceeding has been gathered, attorneys must decide how to use the information. Although the CPR does not give explicit guidance on this issue either, it appears that there are some limitations on what can be done with the information. The CPR implies that an attorney, when lobbying on behalf of his client, should make full use of all information, regardless of whether or not it comes from confidential sources. First, DR 7-101(A)(1) states: "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law." If a lawyer has information which he does not use despite his client's desire that he use it, the lawyer has not used "all available means." Second, the ethical rules accompanying Canon 7 indicate that a lawyer should always take all measures that would support the best interests of his client. Ethical Consideration 7-9 states, for example, that "a lawyer should always act in a manner consistent with the best interests of his client." If the information is helpful in making a client's case, it should be used.

A lawyer must be careful in using this evidence if the complaint is before an international tribunal. Confidential information might not be admissible under international guidelines. If the information is not admissible, a lawyer may not use the information in a legal proceeding. Even so, the CPR permits lawyers to use confidential information in developing a litigation strategy and in lobbying in the UN for their clients' positions.

C. Conclusion

The discussion above argues that attorneys have an obligation to seek out and obtain confidential information if such information would help their clients take full advantage of the legal system. Taking full advantage of the legal system translates into gathering enough information to develop a litigation strategy.

of State, but had not otherwise been published. The Court relied upon the theoretical availability of the proclamation to any individual who requested it. Id. at 199. Under the 1503 process, however, the secret decisions and secret procedures are not even theoretically available to the claimant. Such secrecy problems in the United States were largely cured by the Administrative Procedure Act, 5 U.S.C. §§ 551–559 (1982), and the Freedom of Information Act. 5 U.S.C. § 552 (1982). But see Martin v. Ruiz, 415 U.S. 199 (1974) (secret law used by Bureau of Indian Affairs).

104. CPR DR 7-101(A)(1).
105. CPR EC 7-9.
107. See CPR EC 7-26 (permitting an attorney to present any "admissible evidence" to a tribunal so long as she does not know that the evidence is false, fraudulent, or perjured).
Since most of the secret law and procedure under 1503 will be useful in establishing a litigation strategy, no ethical problem should arise from seeking out confidential information for the benefit of a client.

IV. AN ATTORNEY'S OBLIGATION TO PURSUE A CLAIM DILIGENCE

International human rights law is a relatively new area of international law. With the possible exception of the European Human Rights Commission and the European Court of Human Rights, most international human rights institutions are still striving to develop their legitimacy, substantive law, and procedures. Similarly, U.S. courts are not yet accustomed to using international human rights law as the basis for decisions or as an aid in interpreting constitutional principles.

While international human rights law has been the subject of more codification than many, if not all, other areas of international law, relatively few judicial or other interpretive decisions have been rendered in U.S. courts or international fora. Since this area of law is relatively new, each case and resulting decision may have a significant impact upon the future development of the law and upon the way the courts and human rights institutions view their roles.

Even though international institutions often do not follow the common law practice of U.S. courts in adhering to precedent, the impact of decisions in particular cases can be considerable. Lawyers and decision makers rely directly or indirectly upon the principles enunciated in previous cases. For example, although the Inter-American Commission on Human Rights does not formally follow precedent, it has developed a body of doctrine which it publishes and attempts to apply in a consistent fashion. Similarly, the Human Rights Committee, organized pursuant to the International Covenant on Civil and Political Rights, regularly issues general comments presenting the Committee's au-


110. See, e.g., Statute of the International Court of Justice art. 59, reprinted in Int’l Court of Justice, Acts and Documents Concerning the Organization of the Court, Series D, No. 1, at 37, 49 (1947).

thoritative interpretation of the various articles in the Covenant.\footnote{It has also on one occasion issued a severely edited account of its procedural and substantive jurisprudence with respect to cases arising under the Optional Protocol to the Covenant.\footnote{Although international human rights cases may be initiated by individuals, the resulting decisions will probably have consequences for many other potential claimants. Lawyers and their clients must consider their ethical obligations to those future litigants when faced with such a case.

A. Examples of the Dilemma


illustrate this problem. \textit{Tel-Oren} arose out of a 1978 terrorist attack by 13 heavily armed members of the Palestine Liberation Organization (PLO) on a bus in northern Israel. The attack, hostage taking, and subsequent events resulted in 34 deaths and 87 injuries. The Israeli survivors brought an action for damages in the U.S. District Court for the District of Columbia alleging jurisdiction under the Alien Tort Claims Act.\footnote{28 U.S.C. § 1350 (1982). Section 1350 provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." \textit{Id}. The Alien Tort Claims Act has been the subject of much commentary since the Second Circuit's decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). \textit{See generally Blum & Steinhardt, \textit{Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala}, 22 \textit{HARV. INT'L L. J.} 53 (1981);}} The federal district court ruled that it lacked jurisdic-
tion over the claim. Plaintiffs appealed and the U.S. Circuit Court of Appeals for the District of Columbia affirmed per curiam with each member of the panel writing a separate opinion. 117

At this juncture, the attorneys for the plaintiffs were encouraged not to seek a review by the Supreme Court. 118 If the Supreme Court granted a hearing, affirmance of the dismissal was inevitable and likely to be accompanied by strong language undermining Filartiga v. Pena-Irala, 119 the most important decision of


117. 726 F.2d at 775. The judges could not agree on a single opinion, but unanimously concurred that the case should not be heard in the U.S. federal courts. Id. Judge Edwards indicated that he agreed with the Second Circuit’s decision in Filartiga, holding that the relatives of an alien who had been tortured to death by a police officer acting under the authority of the alien’s government could maintain an action in federal district court against the police officer. Id. at 776 (Edwards, J., concurring). Judge Edwards distinguished Filartiga from Tel-Oren by noting that the PLO did not qualify as a government, id. at 791, and that there existed no international customary law prohibiting the terrorist acts alleged in the suit. Id. at 795–96. Judge Bork filed a lengthy concurring opinion in which he strenuously disagreed with the interpretation of section 1350 adopted in Filartiga. Id. at 820–21 (Bork, J., concurring). He theorized that in order for section 1350 to establish jurisdiction, not only must there be a violation of international law, id. at 806–08, but international law must expressly create a domestic cause of action in tort. Id. at 801. Since it is unclear whether there exists any such international law, Judge Bork’s opinion would essentially turn section 1350 into a nullity. Judge Robb’s opinion suggested that the court should not take jurisdiction because the case raised political questions. Id. at 823 (Robb, J., concurring). If Judge Robb were so concerned about the political implications of the law suit, he could have suggested that the court seek the advice of the U.S. Department of State, as did the Second Circuit in Filartiga.

118. Telephone conversation with Jeffrey Peck, Washington, D.C. (May 1984) (Peck was one of the attorneys for the plaintiffs in Tel-Oren); Conversation with Professor Richard Lillich, University of Virginia Law School (April 24, 1985). Attorney Peck told me that others had called to urge that no petition for certiorari be filed. After the circuit court’s decision one observer commented:

Hanoch stands as an unfortunate example of what can go wrong when attorneys bring actions based on international human rights law claims without the advice and support of international law experts. As bad as was the district court decision, the prevailing wisdom was and is that it should never have been appealed. Certainly, the opinions we now have are far more damaging. Because of the prestige of the D.C. Circuit on international law questions in general and of Judge Bork in particular, the opinions are likely to be more influential than their confused analyses would otherwise suggest.

Recent Cases, HUMAN RTS. ADVOC. NEWSLETTER, Apr. 1984, at 1, 2–3.

119. 630 F.2d 876 (2d Cir. 1980).
the past thirty years applying international human rights law in the courts of the United States. One of the attorneys for the plaintiffs responded to this advice by saying that he had only a duty to his client and no ethical responsibility for the favorable development of the law.120

In Baby Boy, the attorneys for the plaintiffs were faced with a similar dilemma. The plaintiffs were challenging legalized abortion in the United States before the Inter-American Commission on Human Rights.121 This case was doomed to failure. The United States has indicated a willingness to be bound by the American Declaration of the Rights and Duties of Man,122 and has signed, but not ratified, the American Convention on Human Rights.123 The American Declaration protects the right to life, but does not indicate when life begins.124 Article 4 of the American Convention protects life from the moment of conception.125 In submitting the Convention for Senate consideration, however, President Carter explicitly proposed a reservation to that provision.126 The attorneys who presented this case to the Inter-American Commission could not have reasonably believed that such a controversial and extraordinarily attenuated case would be the occasion for the Commission to determine, for the first time in its history, that the United States was in violation of its international human rights obligations within the Inter-American system.127

124. See American Declaration, supra note 122, at art. 1.
125. See American Convention, supra note 123, at art. 4.
127. Indeed, Case 2141 has established a sufficiently significant precedent to be cited in INTER-AMERICAN COMM’N ON HUMAN RIGHTS, supra note 111 at 186 (1982). The case is also given prominent attention in T. BUERGENTHAL, R. NORRIS & D. SHELTON, supra note 2, at 29–31, 71–76. See also Shelton, Abortion and the Right to Life in the Inter-American System: The Case of “Baby Boy," 2 HUM. RTS. L.J. 309 (1981). Professor Shelton suggests that the Inter-American Commission might have sought the advice of the Inter-American Court of Human Rights on this case. Id. at 316. She admits that the result was “arguably correct,” but criticizes the reasoning of the Commission. Id. at 310. While human rights scholars might want to encourage use of the Inter-American Court, reference to that court in this case would only have compounded the risks of this “bad case” making “bad law.”
In both of these cases, the plaintiffs had virtually no chance of succeeding with their claims. While the plaintiffs had nothing to lose by bringing the case or making the appeal, the harm done to other potential plaintiffs was significant. The broad precedent set in these cases prevents other plaintiffs from making claims which might have a greater chance of success.

When such a situation arises, an attorney is confronted with several difficult questions. She must consider whether she has an ethical obligation only to the immediate client or whether the interests of others may be taken into account. Is there an ethical obligation to pursue all avenues of review for the client, even when the attorney knows that there is a high probability of defeat if the case is pursued further? Conversely, does the lawyer have any obligation to other litigants with similar claims which would be adversely affected if a regressive precedent is established? Should the victories of clients and attorneys be measured in terms of the building of legal institutions and precedents or in the success of individual claims?

B. The Model Code of Professional Responsibility: Zealous Representation

The Model Code requires that a lawyer stay within the bounds of the law. Disciplinary Rule 7-102 describes the bounds of the law for an attorney. It states:

In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another. Moreover, a lawyer may not advance an unwarranted defense which cannot be supported by a good faith argument, knowingly make a false statement of fact, or conceal or assist in conduct that the attorney knows to be illegal or fraudulent.

The Model Code fails, however, to define explicitly what constitutes zealous representation. Disciplinary Rule 7-101 states under the heading of “Representing a Client Zealously”:

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means. . . .

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

128. CPR Canon 7.
129. Id. at DR 7-102(A)(1).
130. Id. at DR 7-102(A)(2)–(7).
131. Id. at DR 7-101(A)(1), (B)(1).
In the situation described above, does DR 7-101 allow an attorney to inform her client that she is not going to pursue the claim any further when in the attorney's professional judgment there is a high probability of losing the case, and a negative decision would adversely affect other potential litigants and sensible development of the law? A broad interpretation of DR 7-101 would permit a lawyer to take this action.

Ethical Consideration 7-5 supports this position. It states:

A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such a decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer. . . .

EC 7-5 states that an attorney may continue in the representation of her client. It does not say an attorney must assert a claim on behalf of her client. By negative implication, these two provisions seem to permit an attorney to fail to assert the claim, or fail to seek further judicial review, and discontinue representation.

A stricter interpretation leads one to the opposite conclusion. DR 7-101(B) allows a lawyer, where permissible, to exercise her professional judgment to waive or fail to assert a right or position of a client. This rule may be interpreted to permit a lawyer not to assert a claim if the client does not wish the claim to be pursued. It may not apply where the client wishes to pursue a precedent-setting decision. Moreover, DR 7-101(A) requires a lawyer to seek the lawful objectives of the client through reasonably available means. By failing to seek judicial review or some precedent-setting decision, a lawyer may be violating this rule—especially when his client wishes to pursue the matter.

Even if the strict interpretation is adopted, a lawyer is not required to seek an objective which she believes may set a bad precedent. EC 7-8 encourages a lawyer to inform the client of all relevant considerations. It states:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. . . . He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. . . .

It is clear that a lawyer may inform the client of potential consequences to other potential litigants and the development of the law.

If a client still wishes to pursue his claim, the lawyer can withdraw from the case. This approach is the preferred resolution of the problem under EC 7-8 and

132. Id. at EC 7-5 (emphasis added).
133. Id. at EC 7-8.
would be permitted under DR 2-110(c)(1)(e)\textsuperscript{134} so long as the decision is made before the claim is filed or review is sought, and not while the parties are in the midst of an adjudicative proceeding.

C. The Rules of Professional Conduct: Reasonable Diligence

Rule 1.3 of the Model Rules states that a "lawyer shall act with reasonable diligence and promptness in representing a client."\textsuperscript{135} The Comment to Rule 1.3 defines reasonable diligence as acting "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."\textsuperscript{136} The use of the term "zeal" may return us to the same analysis as that for DR 7-101. If the Model Rules define "reasonable diligence" as equivalent to "zealous representation," the lawyer will have the same difficulty with the Model Rules as with the Model Code in deciding whether or not to pursue a claim or judicial review for a client. The Model Rules, however, include other provisions which indicate that the analysis should not be identical to the analysis of the Model Code. These provisions indicate that a lawyer may inform his client that he will not pursue the case because of the high probability of losing and the adverse affect on future litigants.

The Comment to Rule 1.2 states that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."\textsuperscript{137} The Comment to Rule 1.3 also gives support to the attorney who does not wish to appeal a case with a high probability of losing. It states that "a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued."\textsuperscript{138}

Rule 1.16 of the Model Rules permits an attorney to withdraw from a case if he does not wish to file a claim or pursue judicial review. It states:

(b) . . . a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if:

. . .

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.\textsuperscript{139}

A lawyer can convincingly argue that pursuing a claim or appealing a case which has a high probability of failure and which may adversely affect other litigants, would be in clear disregard of the interests of other potential litigants, and thus

\textsuperscript{134} Id. at DR 2-110(C)(1)(e).
\textsuperscript{135} MODEL RULES Rule 1.3.
\textsuperscript{136} Id. at Rule 1.3 comment (emphasis added).
\textsuperscript{137} Id. at Rule 1.2 comment.
\textsuperscript{138} Id. at Rule 1.3 comment.
\textsuperscript{139} Id. at Rule 1.16 (emphasis added).
imprudent or repugnant. In this context, a lawyer may withdraw from the case even if the interests of his client might be adversely affected.

D. Conclusion

This analysis does not establish that a lawyer has a duty to abstain from pursuing a case which has a small chance of success, which may adversely affect other clients, or which may have a detrimental effect on the progressive development of the law. This section has argued, however, that a lawyer has a choice under the Model Rules and probably also under the Model Code. At minimum, a lawyer has an obligation to explain to the client the consequences of pursuing a case, the likelihood of failure, the implications for the development of the law, and the impact on other prospective litigants. For example, in a test case, a lawyer should inform his client that if the case is lost, the client will become rather infamous—at least in the relevant community and law school casebooks. Indeed, the client might be told that if he insists on pursuing a claim such as those brought in *Tel-Oren* or *Baby Boy*, his case may become the *Dred Scott* of international human rights law. The client should have an opportunity to make an informed decision whether to pursue the matter. If, after he has been fully informed of the possible ramifications of his appeal, the client still wishes to pursue the matter, the attorney may withdraw from the case. The CPR limits withdrawal to situations where the case is not currently before a tribunal. The Model Rules would permit withdrawal in a broader range of situations.

V. Conclusion

International human rights lawyers often face practical and ethical problems that do not confront their colleagues who work in the international commercial world. These unusual challenges should be squarely faced. The ethical precepts discussed in this article provide initial guidance for the U.S. lawyer practicing international human rights law. Nevertheless, the ethical precepts of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct were not designed for the unusual environment that human rights lawyers encounter as international trial observers or as advocates in international human rights procedures. Hence, the lawyer must extrapolate and interpret by analogy from the Model Code and the Model Rules in order to obtain useful guidance.
